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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 573rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 19 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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* No summary record was prepared for the rest of the meeting.

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V.95 59128 (E) (a/CN.9/SR.573)

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The meeting was called to order at 9.45 a.m.

The discussion covered in the summary record began at 10.05 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (A/CN.9/410)

1. **Mr. SEKOLEC** (Secretariat), introducing the report of the Secretary-General on draft Notes on Organizing Arbitral Proceedings (A/CN.9/410), said that arbitration laws and rules typically allowed arbitrators broad discretion in the conduct of proceedings. Unlike court proceedings, which had fairly well-developed procedures and usages, arbitral proceedings differed not only from one arbitral institution to another, but also from one arbitrator to another. As a result, the parties, panel members, advocates and others involved in a given arbitration might have different expectations as to the conduct of the proceedings. If they did not receive timely guidance on how to proceed, there might be misunderstandings and delays, and in extreme cases a party might even feel it had not been given sufficient opportunity to present its case.

2. Those considerations had led the Commission to decide to prepare a text in order to explain to practitioners, in a non-binding fashion, matters concerning the organization of arbitral proceedings. For the first such text, entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), the Secretariat had sought information and views from all types of practitioners, as well as from national arbitral bodies, groups of experts and the International Council for Commercial Arbitration (ICCA).

3. Three guiding principles had been adopted in preparing the present draft Notes. First, the text should not in any way limit the beneficial flexibility of arbitration. Secondly, it should not establish any requirement beyond the existing rules, laws and practices, and should be limited to reminding practitioners of the procedural topics on which procedural rules might be useful, in the form of a check-list that offered broad hints about possible approaches or types of decisions the arbitral tribunals might wish to adopt. Thirdly, the text should not attempt to harmonize or unify existing arbitral practices.

4. Another consideration which had affected the drafting was the fear that if the Commission suggested solutions, they might, because of UNCITRAL's prestige, be given much more weight than the authors had intended. Accordingly, views on solutions were expressed with some reserve, and the title had been changed from "Guidelines", which was felt to be too strong, to "Notes".

5. **Mr. GRIFFITH** (Australia) said that the text, which took into account points made at the previous session, was now very tight and useful, providing a check-list of matters for possible consideration. Rather than listing all those various matters under the table of contents, however, he wondered whether it would not be more useful to give them in paragraph 11, in the form of a check-list as such.

6. **Mr. BROQVIST** (Observer for Sweden) said that the draft text had been favourably received in his country as being very useful for arbitration practitioners. One possible effect would be to harmonize arbitration practice between different jurisdictions. Although that might be contrary to the authors' intentions, the response to the idea had been very positive in Sweden. The Notes would help less experienced arbitrators to understand what was expected by other parties.

(*Mr. Broqvist, Observer for Sweden*)

7. Questions had been raised about the legal status of the Notes — whether they were to be regarded as binding, or at least as putting pressure on practitioners — and fears had been expressed that they might be used for the purpose of delaying proceedings or as an argument in an action against an award. However, there was no reason for such misgivings. The title, the introduction and the individual notes themselves all made it clear that the text was not binding.

8. The authors seemed to have had in mind primarily proceedings which involved a number of different procedural systems. It might be made clearer that purely national proceedings might be expected to be governed by domestic procedural rules to a greater extent than the Notes suggested.

9. **Mr. FOUCHARD** (France) said that while the draft Notes represented a considerable improvement over the previous version, particularly through the dropping of items that could have caused problems, they could perhaps be shortened further. He welcomed the fact that the title had been changed from "Guidelines" to "Notes" and that there was no longer any great emphasis on the need for preparatory conferences, which had once been the main purpose of the document. The overall structure was much more suited to the objective of assisting practitioners with concrete questions arising in arbitral procedures. The chronological organization was much more appealing.

10. None the less, his delegation still had great reservations about the whole project. It would serve no useful purpose, in so far as for experienced arbitrators it would be quite superfluous, while among inexperienced arbitrators it would cause anxiety and give rise to errors in practice by confronting them with the difficulty of their task at the very start. The check-list would be alarming for most arbitrators, although many of the matters in question would not ever come up, or would do so only later, gradually and in a manner not foreseeable at the outset. The text was above all dangerous, despite its non-binding character, because it was wrong for UNCITRAL to give advice which was not purely legal, but rather concerned practical matters completely unrelated to its mandate. Despite the modesty of the text as it now stood, the prestige enjoyed by UNCITRAL and the success of its earlier work on arbitration were such that it would be impossible to prevent lawyers from treating it, whether in good or bad faith, as a source of arguments for complicating procedures or contesting awards.

11. **Mr. SZURSKI** (Poland) said that, in general, it was important to have a clear idea about the purpose of the Notes and to choose a title that properly reflected the substance of the document. The present text constituted a wide-ranging analysis of practice in the conduct of arbitral proceedings which would be very helpful to practitioners. It could hardly, however, be called "suggestions for consideration", as in paragraph (2) of the document, since it covered such a wide variety of approaches. He wondered whether UNCITRAL should not in fact offer suggestions or views on how, taking into account the wide range of existing practices, arbitrators could solve problems arising in international commercial arbitration and give guidance as to what was or was not compatible with a properly conducted arbitration process. Such views and suggestions would be of great help to inexperienced arbitrators throughout the world, but they would be by no means binding. The title of the document might then be amended to "UNCITRAL views or suggestions".

12. **Mr. GONZALEZ SORIA** (Observer for the Inter-American Commercial Arbitration Commission) emphasized his agreement with the policy underlying the document. It was right to stress that its effect should not be to undermine the flexibility and freedom of arbitrators and arbitration tribunals. He welcomed the emphasis in the first three paragraphs on the non-binding character of the Notes, whose function was to assist arbitrators and provide a description of problems encountered in practice. A more ambitious text might raise problems like those mentioned by the representatives of France and Sweden. So long as the Notes did no more than provide assistance in the form of a check-list, it would be of great technical value. He would be glad to submit the document, with any amendments that might be made, to his organization's Conference, to be held in November 1995, in Asunción, Paraguay, so that it could be disseminated in the Americas.

13. **Mr. HODEL** (Observer for Switzerland) said that his country had been sceptical from the start regarding the idea of adding a preliminary stage to the arbitration proceedings. He questioned the usefulness in principle of such an exercise, which might in many cases prove counterproductive. There was the danger that such a preliminary stage might be given excessive importance and thus influence the main proceedings. It might make the proceedings more cumbersome and costly. Parties and arbitrators might be encouraged to use such preliminary procedures even when they were not appropriate. It should not be forgotten that an extra stage in an arbitration process would benefit a party that wanted to hold up the process. The Notes would probably lead to greater formality in the conduct of proceedings and were unlikely to simplify the tasks of deciding and judging, especially when used by an inexperienced arbitrator.

14. **Mr. CHOUKRI SBAI** (Observer for Morocco) regarded the document as an excellently prepared contribution, which had succeeded in avoiding several thorny problems that had given rise to heated discussion in the past. Its importance lay precisely in its non-binding character, as expressed in paragraphs 2 and 3. It provided a set of guidelines which arbitrators could use if they wanted to, but it would also be useful for the parties concerned because it set out the general principles and objectives of arbitration.

15. **Mr. ABASCAL ZAMORA** (Mexico) said that the Notes provided a legal guide that would be of great use all over the world, but especially in areas where arbitral proceedings were less developed than in Europe. International commercial arbitration was expanding quickly throughout the world, and it was clearly appropriate to help to resolve international commercial disputes and apply uniform international trade law to relations between commercial entities in all countries. Some people, however, saw the Notes as dangerous, fearing that they might establish a minimum standard that would then be used as a reason not to accept arbitration. That danger was met by the non-binding character of the rules, as stated in paragraphs 2 and 3 of the Notes, and even more clearly in paragraph 10. Since the check-list of issues did not set up minimum standards, but simply pinpointed the most important factors with a view to assisting inexperienced arbitrators, it was hard to believe that parties would be able to use it to delay proceedings.

16. **Mr. LEBEDEV** (Russian Federation) said that the document as a whole was an excellent reflection of the functions and objectives of UNCITRAL. It dealt with the practice of commercial arbitration and promoted the application of international instruments, including a number produced by UNCITRAL. He did not view the Notes as a set of rules or recommendations, but as a document intended to draw attention to organizational and technical problems that might arise in international commercial arbitration. It was perfectly logical to concentrate on such procedural issues in arbitration processes. The document prepared by the Secretariat had taken account of comments made at the twenty-seventh session of the Commission as well as at the XIIth International Arbitration Congress (Vienna, November 1994) and elsewhere. It was more sharply focused and concise than the previous version. Such concision was not necessarily an advantage: a more specific and detailed document might have been more useful. He found it difficult to understand the

(*Mr. Lebedev, Russian Federation*)

concerns expressed by certain experts, which were perhaps connected with the fact that some countries already had well-established procedures set out in normative texts. There did not seem to be any real risks in the present text that had not existed in the previous version. Indeed, the present document could help to reduce the costs involved in arbitration. Its main importance, however, was that it directed attention to typical problems that arose in arbitration proceedings and covered a wide range of highly relevant issues. The present text allowed more flexibility than the previous version and was certainly not binding. Jurists and commercial and business circles throughout the world would be able to use it or not as they wished.

17. **Mr. MADRID** (Spain) said that the Secretariat had taken great care to make it clear that the text did not even contain recommendations, but was simply intended to be a useful tool for those having recourse to arbitral proceedings. In his view, there was no risk of a negative impact, as had been suggested by certain speakers, since its only purpose was to help those who might wish to make use of it in all kinds of arbitration proceedings, not just in the field of international commercial arbitration. It contained many references to applicable arbitral rules and even a reference in paragraph 91 to national laws. Whatever the kind of arbitration involved, a guide such as the present text would be of great assistance. It might be a good idea to bring out its purpose more sharply in the opening paragraphs so as to alleviate the fear that it might reduce the flexibility that was so important in arbitration.

18. **Mr. HOLTZMANN** (United States of America) expressed his appreciation of the Secretariat's efforts in producing a much-improved document. Perhaps some changes could be made to allay the fears of the French representative. He would in fact be suggesting the deletion of some provisions that might even by inference appear to constitute recommendations; if the Notes were made recommendations, that might affect the flexibility regarded by many as important. On the Spanish representative's point that the Notes might be useful in national arbitration, he thought it might be presumptuous to indicate that a document focusing on the differences of approach that might occur in international arbitration was also addressed to national arbitrators, although parts might indeed be useful to them. As to the form, he could agree to the suggestion of the Australian representative.

19. **Mr. RENGER** (Germany) said he could accept the Notes as a very helpful document that met its purpose, since it was not binding and merely constituted an aid to arbitrators and parties to arbitration proceedings.

20. **Ms. ZHANG Yuejiao** (China) welcomed the document. The Commission should conduct its discussion on the basis of the non-binding nature of the Notes, the need for flexibility and the principle that using the Notes should not result in increased delay or expense in arbitral proceedings. There was room for some improvement to bring the document into line with those criteria.

21. **Mr. SWIFT** (United Kingdom) endorsed the three guiding principles set out by Mr. Sekolec. The Notes would be particularly helpful in bridging the gap between parties from different legal backgrounds. Practitioners in his country considered that the Notes would be useful, and, far from increasing costs, should, by avoiding uncertainty and delay, reduce them.

22. **Mr. AL-ZEID** (Observer for Kuwait) thanked the Secretariat for its work in preparing the comprehensive document which would be of considerable assistance in arbitration. He believed that it was unnecessary for the Commission to discuss the document in detail and that only general comments need be made.

23. **The CHAIRMAN** called for a discussion on the document section by section. To save time, members should avoid trying to re-write the text.

Paragraphs 1-3

24. **Mr. ABASCAL ZAMORA** (Mexico) considered that the Notes laid too much stress on the powers of the arbitral tribunal. It should be made clear that adoption of the procedures discussed in the Notes did not depend exclusively on the arbitral tribunal but was subject to agreement between the parties to the arbitration. It was important, moreover, to indicate that the parties should not adopt procedural agreements binding the arbitral tribunal in such a way as to deprive it of the flexibility that it needed.

25. **Mr. GRIFFITH** (Australia) suggested that the list of contents on pages 2-4 of the document should be placed after paragraph 11 as a check-list.

26. **The CHAIRMAN** noted that there were no objections to that proposal and requested the Secretariat to make the necessary change.

The meeting was suspended at 11.35 a.m. and resumed at 11.50 a.m.

27. **Mr. HOLTZMANN** (United States of America) suggested that at the end of paragraph 1 it should be made clear that the Notes referred to arbitrations that were administered by an institution as well as those that were not.

28. The description of the Notes in paragraph 2 as "merely suggestions" was unfortunate, since the Commission had been told that they were not recommendations or suggestions. Paragraph 2 should be rewritten in a more affirmative form to indicate that the Notes did not establish any binding legal requirement on parties or arbitrators and that their sole purpose was to remind parties of matters that might be considered at an appropriate stage to facilitate the arbitration process.

29. **Mr. SZURSKI** (Poland) agreed with the comment of the United States representative on paragraph 1.

30. He suggested that the first sentence of paragraph 2 should be reworded as follows: "The Notes have been prepared for consideration. They do not affect the procedural prerogatives of the arbitral tribunal in conducting the arbitration." The second sentence was unnecessary and should be deleted.

31. The first sentence of paragraph 3 should also be deleted and the paragraph should read: "The use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon."

32. **Mr. GONZALEZ SORIA** (Observer for the Inter-American Commercial Arbitration Commission) supported the proposals of the Polish and United States representatives, which would help to emphasize the non-binding character of the Notes.

33. **Mr. CHOUKRI SBAI** (Observer for Morocco) supported the United States proposal on paragraph 1.

34. **Ms. ZHANG Yuejiao** (China) said that her delegation shared the view that the Notes could be of assistance not only to arbitration practitioners, but also to arbitration institutions.

35. **Mr. LEBEDEV** (Russian Federation) said that the second sentence of paragraph 3 should be retained, since it dealt with an important point. Arbitration rules could in fact include regulations on matters not dealt with in the Notes.

36. **Mr. MADRID** (Spain) said that his delegation could go along with the United States proposal. Perhaps the word "international" should also be inserted.

37. **Mr. ABASCAL ZAMORA** (Mexico) felt that the term "administered arbitration" was obscure. He would prefer "institutional arbitration".

38. **Mr. HOLTZMANN** (United States of America) agreed that "administered arbitration" might be ambiguous, but felt that "institutional arbitration" also lacked clarity. A phrase along the lines of "arbitration administered by an institution" might make the function and role clearer. Any necessary redrafting could be left to the Secretariat.

Paragraphs 4 and 5

39. **Mr. SZURSKI** (Poland) said that the last two sentences of paragraph 5 were unnecessary and could be deleted.

40. **Mr. HOLTZMANN** (United States of America) said that, in his view, the words "timely procedural decisions" appearing in the heading should be replaced by a phrase such as "timely decisions on organizing the proceedings", or "timely decisions on the conduct of the case". The term "procedural" where used in the same context elsewhere in the text should be avoided and appropriate drafting changes made. Many "procedural" matters covered by the Notes were regarded in some legal systems as matters of substance.

41. In paragraph 4, the words "the type and complexity of issues of fact and law" could be deleted; they now had little meaning, since the accompanying description contained in an earlier draft no longer appeared in the Notes. Also, the phrase "a cost-efficient resolution" could be expanded to read "a just and cost-efficient resolution".

42. The text should indicate that arbitrators' discretion might be limited by the rules agreed upon by parties as well as by other agreements of the parties and any provisions of applicable procedural law. Perhaps a new paragraph 5 *bis* could be created for that purpose.

43. **Mr. FOUCHARD** (France) said that a simpler alternative wording to "usefulness of timely procedural decisions" in the heading might be "usefulness of organizing the arbitral procedure in a timely fashion". With regard to the discretion of arbitral tribunals, limiting factors included not only the will of the parties and agreements between them, but also the fact that parties were subject to procedural law and had to abide by arbitral procedures regardless of applicable law. It would therefore be better to say that arbitrators' discretion was limited by the parties themselves and by fundamental principles of law.

44. **Mr. HOLTZMANN** (United States of America) said that he could partly go along with the French representative's proposals. It was, however, necessary to retain the reference in the heading and in the text to "timely decisions".

45. **Mr. ADENSAMER** (Austria) agreed with the representative of France that the notion of "decisions" should be avoided. That would make it clear that the text was not designed to encourage appeals or efforts to protract proceedings.

46. **Mr. ABASCAL ZAMORA** (Mexico), referring to the remarks by the representative of France concerning the law of procedure, said that it would be preferable to speak of the law of arbitration, since some lawyers tended to equate the term "procedure" with judicial proceedings.

47. **Mr. HOLTZMANN** (United States of America) suggested, with a view to accommodating the concerns of the Austrian and French representatives, that the heading might read "Discretion in conduct of proceedings and usefulness of timely consideration of the organization of proceedings".

48. **Mr. LEBEDEV** (Russian Federation) said that a suitable alternative to the expression "procedural decisions" might be "procedural orders", which appeared in paragraph 11, since such orders were decisions that the arbitral tribunal had to take. The final drafting could be left to the Secretariat.

49. **Mr. SZURSKI** (Poland) said that paragraphs 4 and 5 dealt essentially with discretion and flexibility in the conduct of arbitral proceedings. Consequently, the heading should simply read: "Discretion in conduct of proceedings".

50. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed that the title be changed to "Discretion in conduct of procedure and usefulness of timely agreements".

51. **Ms. ZHANG Yuejiao** (China) said that discretion in the conduct of proceedings and timeliness of procedural decisions were both important aspects and should be retained.

52. **The CHAIRMAN** said that the Secretariat would look into the matter of finding an alternative term for "procedural decisions".

Paragraphs 6-8

53. **Mr. HOLTZMANN** (United States of America), referring to paragraph 6, said that it should be emphasized that there were limitations to the independent decision-making capacity of the presiding or sole arbitrator. Perhaps the first five words of the paragraph might therefore be replaced by a phrase along the lines of "While some rules, agreements of parties or determinations by arbitral tribunals provide that various decisions on organizing procedures may be taken".

54. The subject of the advantages and disadvantages of consultations was a sensitive and controversial one, and the text that dealt with it raised questions, but did not and could not provide any answers. He accordingly proposed that the first sentence of paragraph 6 be retained and the rest deleted.

(Mr. Holtzmann, United States of America)

55. In paragraph 7, the phrase "at the place of arbitration or at some other appropriate place" should be deleted, since it might conflict with rules or even laws that required different organizational arrangements. Also, a phrase such as "or by other methods or combinations of methods or by meetings" should be included at the end of the paragraph. That would broaden the scope of the consultations in a manner that was in fact intended and had been provided for in previous drafts.

56. **Mr. HERRMANN** (Secretary of the Commission) said that the Secretariat's task of implementing the changes requested by delegations would be difficult unless they were accompanied by clearly and fully worded proposals. Such an approach would also assist delegations in adopting positions on proposals made by other delegations. It was therefore necessary for the Commission to decide upon the procedure to be adopted for presenting proposals to the Secretariat.

The meeting rose at 12.35 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 574th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 19 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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Distr.: 24 November 1995

The meeting was called to order at 2.10 p.m.

ELECTION OF OFFICERS (*continued*)

1. **The CHAIRMAN** invited nominations for the remaining post of Vice-Chairman of the Commission.

2. **Mr. LEBEDEV** (Russian Federation) nominated Mr. Tadeusz Szurski (Poland).

3. *Mr. Szurski (Poland) was elected Vice-Chairman by acclamation.*

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/410)

Paragraphs 6-8 (*continued*)

4. **Mr. FOUCHARD** (France) questioned the reference in paragraph 6 to the possibility of inviting the parties to enter into a procedural agreement. A discussion of the rules governing procedure with the parties could be time-consuming and needlessly tie the hands of the arbitral tribunal in advance.

5. Commenting on the reference by the representative of the United States of America to the phrase "at the place of arbitration or at some other appropriate place" in paragraph 3, he said that a certain amount of flexibility should be preserved regarding the place where a meeting was to be held. There was a distinction between the official venue of the proceedings, which was that where the award would be delivered, and the place where the arbitral tribunal actually met, which should be left to the discretion of the tribunal.

6. **Mr. HOLTZMANN** (United States of America) said that he agreed with the representative of France that the arbitral tribunal should be free to meet wherever it wished. However, such flexibility was not permitted under certain rules and laws, and the Notes should take account of those cases.

7. With regard to the consultations envisaged in paragraph 8, he thought that more emphasis should be placed on the fact that they could take place at various times, be held in conjunction with hearings and be conducted by various methods.

8. Footnote 2 relating to paragraph 4 referred to the UNCITRAL Arbitration Rules. He suggested that the Notes would have wider acceptability if that footnote were deleted.

9. **Mr. SZURSKI** (Poland) said that he agreed with the comments of the representative of the United States of America on paragraphs 6 and 7.

10. The first sentence of paragraph 8 seemed to say that a meeting for consultations could be devoted only to procedure. Consultations were also held in some cases on matters of substance. The sentence could either be deleted or amended to read as follows: "A meeting can be devoted to procedure only or can be held in conjunction with a hearing on the substance of the dispute".

11. **Mr. SEKOLEC** (Secretariat) said that the sentence had been intended to convey that meaning and could be reworded to improve its clarity.

12. He asked the representative of France whether his objection to paragraph 6 related to the possibility of the parties reaching agreement on a limited procedural point, which was the intended purport, or to the risk of the phrase being misunderstood as an invitation to the parties to enter into a broader agreement on a set of arbitration rules, an eventuality dealt with in paragraph 15.

13. **Mr. FOUCHARD** (France) said that he had been fearful of the second interpretation. He had no objection to the parties being invited to reach agreement on a limited procedural point.

Paragraphs 9-11

14. **Mr. FOUCHARD** (France) expressed concern that the wording of the last sentence of paragraph 11 ("*... liste de contrôle pour l'établissement d'un ordre du jour*" in the French version), might be understood to imply that there would be an agenda and a meeting, whereas it had been agreed that the organization of the proceedings would not necessarily involve such a meeting. He was also unhappy with the idea of a "check-list", which implied that there was a long list of matters to be considered.

Section 1 of "Procedural Matters for Possible Consideration" (paragraphs 12-14)

15. **Mr. HOLTZMANN** (United States of America), supported by **Mr. GRIFFITH** (Australia), suggested that it would be more tactful to place the section dealing with deposits for costs later in the text. Many arbitrators would find it uncomfortable to open their consultations with the subject of deposits, most of which would go towards covering their own fees. The earlier draft of the Notes had placed the subject much later in the text, an approach consistent with most arbitration rules.

16. **Mr. SEKOLEC** (Secretariat) said that the item had come at the end of the Notes in the earlier draft, which followed the structure of many sets of arbitration rules. In the new structure, based on a chronological order it could perhaps, in view of its importance, be moved to fourth or fifth place.

17. **Mr. FOUCHARD** (France) said that in practice arbitrators were concerned about deposits. Tact was all very fine but it would be hypocritical to imply that deposits for costs were not among the early questions to be considered.

18. **Mr. ABASCAL ZAMORA** (Mexico) suggested combining the section dealing with deposits and that dealing with administrative services.

19. **The CHAIRMAN** suggested that it should be left to the Secretariat to move the three paragraphs to a more suitable place in the text.

Section 2

20. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed deleting the last sentence of paragraph 15. He did not agree that the consideration of a set of arbitration rules might unduly delay the proceedings or give rise to unnecessary controversy. In his view, it would expedite the proceedings. In the second sentence,

(Mr. Choukri Sbai, Observer for Morocco)

the words "the arbitral tribunal might consider it appropriate" could be replaced by the words "it is advisable for the arbitral tribunal".

21. **Mr. ABASCAL ZAMORA** (Mexico) said that he was in favour of deleting the last sentence, which implied that the parties should not be invited to consider adopting a set of arbitration rules. It was preferable, in his view, to base arbitral proceedings on tried and tested rules.

22. **Mr. HOLTZMANN** (United States of America) recapitulated certain practical objections raised at the previous session to the idea that arbitrators should invite parties to stipulate a set of arbitration rules where they had not already done so. Those criticisms were reflected in the Commission's report (A/49/17, para. 138). In support of the idea it had been said (*ibid.*, para. 139) that, where parties began such talks and their discussions showed signs of becoming protracted, the arbitrators could discontinue the talks; yet that might prove difficult and create bad feeling. Moreover, where parties had opted to use a set of rules — for example, those of the International Chamber of Commerce (ICC) — and one of them wished, say to challenge an arbitrator, its application would be rejected by ICC on the ground that the party had no standing with that body. Subsequent referral of the issue to a national court might well produce the same response, and not necessarily a rapid one. He believed that the possibility open to arbitrators in paragraph 15 could lead the parties into expense. It could also, by implication, discourage arbitrators from exercising their own discretion about the rules which were to apply to proceedings. Those considerations led his delegation to suggest the deletion of paragraph 15 or, failing that, the addition to it of further cautions.

23. **Mr. FOUCHARD** (France) broadly endorsed the remarks made by the United States representative. He believed the paragraph should be retained, however, since it usefully indicated that, in one way or another, arbitral proceedings must be organized. Perhaps the paragraph might state that the adoption of a set of rules was not a necessity, but that parties might consider it. At all events the caution expressed in the last sentence of the paragraph should remain.

24. **Mr. SZURSKI** (Poland) said that article 15 should be seen as dealing with ad hoc arbitrations, not administered ones. If an arbitral tribunal existed, it had to be assumed that it did so by virtue of an agreement between the parties which specified a place of arbitration and thus determined the applicable law. The text should recommend the parties to consider adopting a set of rules; if they did not do so, the applicable law would operate, and in most cases the arbitrators would thus have discretion to decide on the conduct of proceedings in regard to matters which the applicable law did not cover. He considered that paragraph 15 was well drafted and should remain as it stood.

25. **Mr. LEBEDEV** (Russian Federation) recognized that paragraph 15 raised complex issues, to which the United States had drawn attention. He did not, however, believe that undue delay would necessarily result where the parties, on the recommendation of the arbitrators, decided to agree on a set of rules. The important point was that, on a broad interpretation of the paragraph, arbitrators might suggest to the parties the adoption of a set of institutional rules, a course which could certainly produce unexpected results and huge complications. Paragraph 15 had merit, and in order to preserve it, but eliminate that defect, he suggested it should indicate that the parties might agree on the application of the UNCITRAL Arbitration Rules; after all, the Notes were drafted by UNCITRAL and the UNCITRAL Rules took account of the interests of all countries. Alternatively, the paragraph might indicate that the parties could agree on the application of either the UNCITRAL Rules or another international set of rules for non-administered arbitrations. He had in mind,

(Mr. Lebedev, Russian Federation)

for example, those of the Economic Commission for Europe. He agreed with the previous speaker that paragraph 15 should be seen as relating to non-administered proceedings only, and with his remarks about the operation of the applicable law. In applying it arbitrators would obviously take account of the international nature of the case.

26. **Mr. ABASCAL ZAMORA** (Mexico) said that, in proposing the deletion of the last sentence, he had seen the paragraph as directed in particular to the adoption of the UNCITRAL Rules, which were tried and tested; where they were to apply, the caution expressed in that sentence would be unnecessary. However, the considerations put forward by the United States representative were substantial ones. He therefore withdrew his proposal.

27. **Mr. GRIFFITH** (Australia) supported the course of action proposed by the Russian Federation, for the reasons expressed by its representative.

28. **Mr. HOLTZMANN** (United States of America) found the Russian suggestions unsatisfactory because, in his delegation's view, paragraph 15 contemplated administered as well as non-administered arbitrations. To limit it to the latter would unduly narrow the scope of the text, the purpose of which was to facilitate both kinds of proceedings.

29. **Mr. SEKOLEC** (Secretariat) asked the United States representative whether he wished paragraph 15 to include an express reference to institutional rules.

30. **Mr. HOELLERING** (United States of America) said that his delegation was opposed to the Russian suggestions; however, it continued to advocate the deletion of the paragraph.

31. **Mr. GRIFFITH** (Australia) said that the implementation of the Russian idea in a way which made clear the fact that paragraph 15 applied to non-administered arbitrations would not prevent the rest of the text from applying to administered proceedings.

32. **The CHAIRMAN** noted the support expressed for modifying paragraph 15 along the lines suggested by the Russian representative. Unless he heard any objection, he would take it that the Commission approved that suggestion.

33. *It was so agreed.*

Section 3

34. **Mr. SZURSKI** (Poland) said that the principle in paragraph 17 should be that translation was to be regarded as unnecessary unless the parties or the arbitrators decided otherwise. It could be assumed that, in international commercial arbitrations, arbitrators would be familiar with more than one language.

35. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that if paragraph 16 was addressed to the parties it should say that the tribunal should urge the parties to determine the language or languages to be used in the proceedings. If the parties did not agree in time, the arbitration tribunal should decide the question.

36. **Mr. MADRID** (Spain) agreed with the representative of Poland that the initial assumption should be that translation would normally not be needed, which would expedite matters. However, care should be exercised in drafting the Notes in order to avoid a peremptory tone.

37. **Mr. HOLTZMANN** (United States of America) said he did not believe that it should be assumed that all arbitrators could normally deal with all the languages involved in arbitration. Such a requirement would create very grave problems, especially in developing countries, and would limit the ability to have party-appointed arbitrators from particular countries. If the chairman did not come from either of the countries of the parties, interpretation and translation would be very necessary, particularly when one of the languages involved was not widely understood by persons serving as chairmen. The idea of a normal rule that translation was not required might be valid within a small region but would not apply in an international context. He would not favour any drafting changes and would support the retention of the current text.

38. **The CHAIRMAN** asked the Commission if it wished to retain the existing text of paragraph 16.

39. *It was so decided.*

40. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the Polish proposal for the amendment of paragraph 17, noted that there was little support for it. He took it that the Commission could accept the existing text.

The meeting was suspended at 3.50 p.m. and resumed at 4.10 p.m.

Section 4

41. **Mr. FOUCHARD** (France) thought that the first sentence of paragraph 20 was unnecessary, as was the word "typically" in the second sentence.

42. In paragraph 21, he felt strongly that the first two criteria mentioned for the choice of the place of arbitration enumerated should be placed at the end of the list.

43. **Mr. SZURSKI** (Poland) agreed that the first sentence of paragraph 20 should be deleted. The second sentence should be amended to read: "If the place of arbitration has not been agreed upon directly by the parties or indirectly, e.g. in the applicable arbitration rules, it is in the power of the arbitral tribunal to determine it."

44. He agreed that the first two criteria listed in paragraph 21 should come at the end.

45. The second sentence of paragraph 22 should be deleted.

46. **Mr. GRIFFITH** (Australia) supported the deletion of the first sentence of paragraph 20.

47. With regard to paragraph 21, he noted that the text had been modelled on the relevant section of document A/CN.9/396/Add.1, appearing under the heading "Place of arbitration", where paragraph 1 contained the statement: "It is generally accepted that the arbitration is governed by the procedural law governing at the place of arbitration". As that provision would still seem to be apposite, he asked why it had been dropped.

48. **Mr. ABASCAL ZAMORA** (Mexico) supported the French proposal regarding the order of items in paragraph 21.

49. **Mr. HOLTZMANN** (United States of America) agreed that the order of items listed in paragraph 21 was inappropriate. Since it was not the purpose of the notes to lay down guidelines for arbitrators, the simplest solution would be to delete the entire paragraph.

50. **Mr. LEBEDEV** (Russian Federation) said that the formulation "perception of a place as being neutral", listed as (f) in paragraph 21, was unclear. Even if paragraph 21 was retained, that passage should be deleted.

51. **Mr. BOSSA** (Uganda) said that the Notes would be useful not only when arbitration was being considered but also to those drawing up agreements out of which arbitration might arise. The points listed under paragraph 21 would be useful to legal advisers and the paragraph should be retained.

52. **Mr. GRIFFITH** (Australia) suggested that paragraph 21 should be redrafted to mention the fact that the procedural law of the place of arbitration ordinarily governed the arbitration and also the relevance of the question whether States were parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

53. **Mr. SEKOLEC** (Secretariat) said that it had been mentioned in document A/CN.9/396/Add.1 that the choice of the place of arbitration largely determined the law governing procedure, but that parties were sometimes permitted to submit the arbitration to the procedural law of a country other than that where arbitration took place. That approach was rarely resorted to and raised many questions of a practical and theoretical nature. It had therefore been thought better not to mention it in the new text. However, item (c) in paragraph 21 made a reference to the law of the place of arbitration.

54. With regard to the New York Convention, it was the primary text but there were regions where other conventions existed and there were also bilateral treaties. A more general reference to treaties on enforcement of arbitral awards had therefore been preferred.

55. **Mr. RENGER** (Germany) said that paragraph 21 should be kept. He would not oppose a reordering of the items listed but would object to the deletion of item (f).

56. **Mr. HOLTZMANN** (United States of America) thought that the key provisions in the paragraph were the legal ones; however, the difficulty lay in drafting them, an example being the problem already mentioned that the law of some countries allowed parties to agree that proceedings would be governed by another law. Finding the right wording would be a sensitive task; even drafting on enforcement raised difficult problems. With regard to subparagraph (f), there were many reasons for choosing a place for arbitration, and he wondered to what extent "neutrality", however it was defined, was relevant. Did it mean that "neutral" countries were to be preferred? The paragraph created more problems than it solved.

57. **Mr. VRELLIS** (Observer for Greece) said his delegation was in favour of retaining the text in paragraph 21 as formulated by the Secretariat. The paragraph stated clearly that the relative importance of the factors listed varied from case to case. The fact that they had been listed in a particular order was not likely to be considered as of any significance from the legal viewpoint.

58. **Ms. ZHANG Yuejiao** (China) supported retention of the existing texts of paragraphs 20, 21 and 22.

59. **Mr. GRIFFITH** (Australia) said that subparagraph (c) seemed to be an oblique reference to the fact that arbitration was governed (unless some agreement to the contrary existed) by the procedural law in force at the place of arbitration. He found it curious that that factor was not given greater emphasis in the new text. The matter was of importance to his delegation, and he suggested that the point should be dealt with at the beginning of paragraph 21.

60. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that paragraph 21 should be retained because of the useful information it contained. Regarding subparagraph (f), what was meant was not political neutrality, but neutrality as far as the parties and their interests were concerned.

61. **The CHAIRMAN** said there had been a proposal to delete the first sentence of paragraph 20, but that it did not seem to have received support. There had been some proposals for changes in the order of subparagraphs in paragraph 21, but no clear support for deletion of the paragraph as a whole. One representative had proposed the deletion of the second sentence of paragraph 22, but others seemed to support the present text. He took it that it could be left to the Secretariat to take into account the comments made.

Section 5

62. **Mr. HOLTZMANN** (United States of America) said paragraphs 23 and 24 implied that arbitral institutions normally made arrangements for a variety of administrative services; in practice, most did not. The paragraphs should be redrafted to make clear that the services referred to were only those needed in connection with hearings, and not, for instance, photocopying or word processing, which would be taken care of by the parties themselves. He did not know of any arbitral institution which arranged travel or hotel bookings, unless the hearing was to be held in a very remote place. In paragraph 24, the phrase "... the institution will usually provide all or a good part of the required administrative support" should be reworded so as better to reflect the realities of the situation.

63. **Mr. FOUCHARD** (France) did not think it was UNCITRAL's role to provide guidance on such matters as travel arrangements and hotel bookings, which were completely outside its mandate. The text should not be made unduly complicated, and should not give the impression that arbitration was a large-scale undertaking which was costly, lengthy and required an extensive infrastructure: in fact, many arbitrations took only a few hours. It was important not to discourage businesses or countries with limited resources from going to arbitration by listing every possible kind of service that might be needed.

64. **Ms. ZHANG Yuejiao** (China) supported the proposal that paragraphs 23 and 24 should be redrafted.

65. **Mr. MADRID** (Spain) agreed that, while administrative services were important, there was no need to list them in such detail. A general statement that the need for administrative services should be borne in mind might be sufficient.

66. **Mr. LEBEDEV** (Russian Federation) agreed that the drafting of paragraphs 23-27 could be improved, but believed they should be retained as reflecting actual arbitration practice. It was important to make clear to those who had no experience of arbitration that there were often considerable costs involved. He supported the draft text in principle, but suggested that towards the end of paragraph 26 a further sentence might be added to the effect that, whereas in an administered arbitration the costs of engaging a secretary would be covered by the institution concerned, in a non-administered arbitration those costs would have to be met by the parties.

67. **Mr. CHOUKRI SBAI** (Observer for Morocco), in response to the comments made by the representative of France, said that while it was true that arbitration might take less time than normal legal proceedings, it could be costly, since arbitrators demanded high fees, sometimes a percentage of the sum claimed. Reference should therefore be made to administrative services, but preferably towards the end of the document, after more important items such as confidentiality, witnesses, and evidence.

68. **Mr. HERRMANN** (Secretary of the Commission) said that, in listing the various items possibly to be considered, the Secretariat had had in mind the order in which the need for them might arise in a typical case of arbitration, not their order of importance.

69. **Mr. SZURSKI** (Poland) proposed that in paragraph 27 the words in the penultimate sentence "... or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", together with the following sentence, should be deleted, since the presence of the secretary at deliberations of the tribunal did not violate any arbitration principle.

70. **Mr. FOUCHARD** (France) supported that proposal: the words were ambiguous and should be deleted.

71. **Mr. CHOUKRI SBAI** (Observer for Morocco) said the presence of a secretary could raise problems, since in some legal systems arbitrators were required to swear an oath, whereas that requirement did not apply to the secretary. His delegation therefore wished to express its reservations as to the deletion proposed.

72. **The CHAIRMAN** said that the Secretariat would take due account of the comments made.

The meeting rose at 5.05 p.m.